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No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

THE CONNECTICUT LIGHT AND POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

BRIEF FILED ON BEHALF OF THE STATE OF CONNECTICUT, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

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FOREWORD.

On May 29, 1935, prior to the enactment of the Federal Power Act, the State of Connecticut enacted additional statutory provisions for the regulation of local public utility companies, the purpose of which is stated therein as follows:

> "The general purposes of this Act are to assure to the State of Connecticut its full power to regulate its public service corporations, to increase the powers of the Public Utilities Commission, and to promote local control of the

NOTE: For convenience, The Connecticut Light & Power Company will be referred to in this brief as "the Company" and the Federal Power Commission will be referred to as "the Commission." The use of italics in quoted excerpts indicates emphasis supplied by the writers of this brief.

public service corporations of this State, and it shall be so construed as to effectuate these purposes." (Connecticut Public Acts of 1935, ch. 191.)

Section 6 of said Act (Cumulative Supplement (1935) §1414 (c), cl. f, p. 592) provides in part as follows:

> " . . . No gas, electric or water company, or holding company, or any official, board or commission purporting to act under any governmental authority other than that of this state or of its divisions, municipal corporations or courts, shall interfere with or attempt to interfere with or exercise authority or control over any gas, electric or water company incorporated by this state and engaged in the business of supplying service within this state, or with or over any holding company incorporated by this state and doing the principal part of its business within this state, without having first obtained the approval of the commission, except as the United States may properly regulate actual transactions in interstate commerce. Any action contrary to the provisions of this section shall be voidable on order of the commission."

In accordance with the policies thus expressed, the State of Connecticut joins in the application of the Company for a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia, which decision affirmed a determination of the Federal Power Commission that the Company is a "public utility" within the jurisdiction of the Commission under the provisions of the Federal Power Act.

The State of Connecticut has a Public Utilities Commission which possesses jurisdiction over local

public utility companies and exercises many of the same regulatory powers with respect thereto which the Federal Power Commission is authorized to exercise over "public utilities" subject to its jurisdiction under the Federal Power Act. In view of the duality of regulation thus engendered, and because of the possibility that conflicts of decision may arise between the state and federal agencies, it is believed that the State of Connecticut possesses a vital interest in the important public questions involved in this case.

This case involves a local electric distributing company which purchases electric energy for the supply of a small isolated portion of its distributing system, the electric energy being supplied by another company, partly (the Commission has found) from sources outside of the State, and being received by the distributing company within the State for local retail distribution therein.

Congress, when it enacted the Federal Power Act, did not intend that the Federal Power Commission should possess regulatory powers with respect to such a company; on the contrary it was intended, under the provisions of the Act, that the State should possess exclusive jurisdiction to regulate such local distributing companies.

The State of Connecticut believes that the assertion by the Commission of current jurisdiction over the Company in the present case represents an unwarranted and illegal invasion of the powers of the State to regulate its local distributing companies, which powers were clearly intended to be preserved to the State under the provisions of the Federal Power Act.

The State of Connecticut therefore, files this brief as *amicus curiae* in support of the petition of the Company for writ of certiorari.

PRELIMINARY STATEMENT.

Under the provisions of the Federal Power Act, individuals or corporations occupying the status of a "public utility", as defined by the Act, are subject to broad regulatory powers of the Federal Power Commission over accounts and accounting; the use and sale of facilities; mergers and consolidations; the acquisition of securities of other "public utilities"; the ascertainment of cost and depreciation of properties; the filing of annual reports and other matters.

Whether individuals or corporations occupy the status of a "public utility" under the Act, depends upon whether they own or operate "facilities subject to the jurisdiction of the Commission" under Part II of the Act, whose provisions apply to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Under such provisions, the Commission is given jurisdiction "over all facilities for such transmission or sale of electric energy," but it is plainly stated therein that, except as specifically provided in Parts II and III of the Act, the Commission "shall not have jurisdiction . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce."

On May 15, 1942, the Federal Power Commission determined that the Company "was", during various periods since the effective date of the Federal Power

Act, and *"continues to be"* a "public utility" under the Act, and made an order directing the Company to "comply" with the Commission's system of accounts and general accounting orders applicable to such a "public utility."

Determination as to present status. The determination of the Commission with respect to the present status of the Company, and the order directing current compliance with the accounting requirements, were founded upon the ownership and operation by the Company of certain facilities located in a substation at Bristol, Connecticut, by which the Company receives into its local electric system there, electric energy purchased by it from the Connecticut Power Company, an independent and unaffiliated corporation. Although not called for by the Company's arrangements with its vendor, such energy was found to include, at times, electric energy originating in the State of Massachusetts. The energy so received is sold and distributed by the Company at retail to local consumers in its Bristol district, wholly within the State of Connecticut.

Determination As To Past Status. Since the State of Connecticut is interested primarily in the Commission's claim to current general jurisdiction over the Company (i.e. at the time of the making of the Commission's determination) and since the Commission predicated such claim solely upon the ownership and operation by the Company of its facilities at Bristol, Connecticut, we shall not discuss herein the situations which existed prior to the hearing and determination of the Commission, with reference to the East Hampton, Torrington-Winsted, and Groton districts of the Company.

REFERENCE TO OPINIONS BELOW.

The findings, opinion and order of the Federal Power Commission are reported unofficially at 44 P.U.R. (N.S.) 170. The opinion of the Court of Appeals for the District of Columbia is reported at 141 F. (2d) 14.

THE QUESTIONS INVOLVED.

The question in which the State of Connecticut is interested is the following:

Whether, under the provisions of the Federal Power Act, a local *distributing* company, operating and *distributing* electric energy for local consumption wholly within the State, is a "public utility" subject to the broad regulatory powers of the Federal Power Commission, because such company owns or operates facilities by which it receives within the State, for local *retail distribution* therein, electric energy purchased from others, and a portion of such energy, through interconnections maintained by the vendors and over which the local company has no control, originates in another State.

STATEMENT OF THE CASE.

A. The Facts.

The principal facts of the case are set forth in the petition for certiorari filed by the Company and, for the sake of brevity, we shall not repeat them here except for a brief reference to the facilities upon which the Commission based its assertion of current jurisdiction over the Company and its accounts.

The facilities owned and operated by the Company which are used to receive electric energy for the supply

of its Bristol District, consist of a substation and appurtenances contained therein, which are connected with the Connecticut Power Company's high tension line in Bristol, Connecticut, all of which are used to receive electric energy from the high tension line; to lower the voltage thereof; and to eliminate fluctuation in the voltage, for local retail distribution of the energy to the Company's consumers in the Bristol District.

These were the *only* facilities owned and operated by the Company at the times of the hearing and determination of the Commission, through which electric energy from Massachusetts was found to pass at such times.

Other facts stated in the petition of the Company for writ of certiorari will be referred to in our argument.

B. The Determination of the Commission as to Present Status of the Company.

The Commission determined that the aforementioned facilities owned and operated by the Company at Bristol were "used for the transmission of electric energy . . . as distinguished from local distribution thereof," and that "from January 1, 1937 *to the present time,*" the Company "was *and continues to be*" a "public utility" under the Federal Power Act.

Thus, while the Commission, with reference to the Company's East Hampton, Torrington-Winsted and Groton Districts, determined that the Company "was" a "public utility" during specified periods ending prior to the hearing and determination, the Commission determined that the Company was and is presently under its jurisdiction by reason of the Company's present

ownership and operation of the facilities at Bristol. The Commission's finding No. 19 reads as follows (R. 69):

> "(19) From January 1, 1937, *to the present time* the Respondent has continuously owned and operated and *now owns and operates* facilities in Bristol, Connecticut, for the transmission of electric energy, transmitted from the State of Massachusetts and consumed in the State of Connecticut by persons other than the transmitter thereof, which facilities were *and are* facilities for the transmission of electric energy in interstate commerce and Respondent was *and continues to be, by virtue of its ownership and operation of such facilities, a public utility within the meaning of that term as used in the Federal Power Act.*"

In accordance with such determination, the order of the Commission purports to direct compliance with its system of accounts and various accounting orders up to the moment of its determination and in the future.* The Commission's order, dated May 15, 1942, which incorporates the Commission's findings as a part thereof, provides, in part:

> "(A) The Respondent is hereby required *to comply* with the aforesaid Order No. 42, order

* The Commission's intention to direct *current compliance* with its accounting orders and system of accounts is clear from its brief to the Court below. After referring to its findings based on the situation in petitioner's Bristol district, the Commission's brief stated:

> "On these findings there can be no doubt as to the *continuing* power of the Commission to require petitioner as a "public utility" to keep its accounts *henceforth* in accordance with the prescribed original cost accounting system *as directed by the order under review*, in addition to completing the original cost and reclassification studies." (Brief for Respondent in the Court below, p. 23).

of May 11, 1937, and the other orders supplemental to said Order No. 42; and *to comply* with the accounting requirements prescribed thereby, *applicable to it as a public utility* within the meaning of that term as used in that act, as of the effective dates of such orders."

C. The Decision of the Court Below.

The Court of Appeals held that the Company "*is* a public utility under the Act," without reference to the question of whether its status may have changed since the effective date of the Act.

The Court did not rest its decision, with reference to the Company's *receipts* of electric energy originating outside of the State of Connecticut, upon the findings of the Federal Power Commission that facilities owned and operated by the Company "were facilities for the transmission of electric energy . . . as distinguished from local distribution thereof." Despite the specific exemptions of various facilities from the jurisdiction of the Commission, as contained in section 201 (b) of the Federal Power Act, including "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce," the Court held that the distinction made in the findings of the Commission was unimportant. Thus, the Court said:

> "Therefore, whether or not the facilities by which petitioner *distributes* energy from Massachusetts should be classified as 'local' *is not relevant to this case.* The sole test of jurisdiction of the Commission *over accounts* is whether these facilities, *'local' or otherwise,* are used for the transmission of electric energy from a point in one state to a point in another."

The Court's decision will be discussed further in our argument.

REASONS FOR GRANTING THE WRIT.

The questions presented here, relating to the receipt and local distribution of electric energy within a state, by a local distributing company, were not involved in *Jersey Central Co. v. Federal Power Commission* (319 U. S. 61) nor in *Hartford Electric Light Co. v. Federal Power Commission* (131 F. 2d 953, certiorari denied 319 U. S. 741) where the utility companies before the Courts were generating or transmitting electric energy which *subsequently* crossed a state line and was consumed in another state.

The decision below, unless reviewed and reversed, would open up a vast new field of jurisdiction for the Federal Power Commission, i.e. over local distributing companies which are fully subject to state regulation, simply because electric energy which they purchase from others may include energy originating in another state. The Court below failed to recognize that no purpose intended by the Federal Power Act would be served by the exercise of such Federal jurisdiction since wholesale rates for interstate sales of such electric energy are subject to regulation by the Federal Power Commission, and the retail rates charged by such distributing companies are subject to regulation by the state commissions.

In determining, under such circumstances, that the Company is a "public utility" within the meaning of the Federal Power Act, the Court below misconstrued the provisions of the Federal Power Act in such fashion

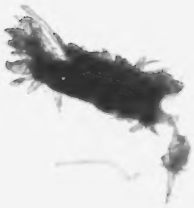
as to nullify the same. The decision, unless reviewed and reversed by this Court, will affect the numerous similar situations existing in all parts of the United States and will seriously prejudice the rights of the States to exercise powers of regulation over utility companies which were intended to be preserved to them by the provisions of the Federal Power Act.

The result of the decision of the Court below is to place under the supervision of the Commission all of the matters which fall within its regulatory powers over a "public utility" under the Federal Power Act, including, among others, the establishing of interconnections with other "public utilities" for sale to or exchange of energy with them (§202); supervision over mergers and consolidations, as well as over the purchase of securities of another "public utility" (§203); the ascertainment of the cost of the company's property and the depreciation existing therein (§208); the prescribing of systems of accounts and the supervision of the keeping of the accounts of the company (§301); supervision over the depreciation accounting of the company and the methods of accruing depreciation therein (§302); and the filing of annual reports (§304).

The petition of the Company states that, according to a survey made by the Edison Electric Institute, there are over 1,000 local electric distributing companies located in 46 States of the United States, which purchase power from larger power systems, the power supply of almost all of which has some component from an interstate source. Doubtless there are numerous situations throughout the country which are similar to the situation of the Company here at Bristol. Under the decision below, all such companies similarly situated

would be subject to the general jurisdiction of the Commission with respect to the aforesaid matters.

The decision below therefore, is one of widespread application throughout the United States and is of great importance to the various States and their citizens. The questions presented in this case, involving the construction of a federal statute, have not been presented to this Court in any other case, either upon the merits or upon petition for certiorari, and should be reviewed pursuant to the present application of the Company.





ARGUMENT.

POINT I.

THE COMPANY IS NOT A "PUBLIC UTILITY" UNDER THE ACT, BY REASON OF THE SOLE REMAINING INTERSTATE CONNECTION AT BRISTOL, I.E., AT THE TIME THE COMMISSION MADE ITS DETERMINATION.

A. IT IS NOT THE PURPOSE OF THE FEDERAL POWER ACT TO REGULATE LOCAL DISTRIBUTING COMPANIES WHICH MAY RECEIVE AND DISTRIBUTE, WITHIN THE STATE, ELECTRIC ENERGY ORIGINATING IN ANOTHER STATE.

In the *Jersey Central* case, supra, both the majority and minority opinions in this Court pointed out that the Federal Power Act was designed to fill the hiatus in regulation, in respect to interstate sales of electric energy *at wholesale*, left by the decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.* (273 U. S. 83).

> *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U. S. 61, 67, 68, 70, 71, 86.

Compare:

> *Public Utilities Commission v. Landon*, 249 U. S. 236;
> *Missouri v. Kansas Gas Co.*, 265 U. S. 298.

The majority of the Court in the *Jersey Central* case said:

> "The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act . . . was to give a federal agency power *to regulate the sale of electric energy across state lines*. Regulation of such sales had been denied to the states by *Public Utilities Commission v.*

> *Attleboro Steam Co.*, 273 U. S. 83. On account of the development of interstate sales of electric energy, it was deemed desirable by Congress to enter this field of regulation." (*Jersey Central Power and Light Co., v. Federal Power Commission*, 319 U. S. 61, 67-8.)

The purpose thus expressed is disclosed, in part, by the declaration of policy appearing in Section 201 (a) of the Act (49 Stat. 847, 16 U. S. C. A. §824 (a), as follows:

> "(a) It is hereby declared that the business of *transmitting and selling* electric energy for *ultimate* distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy *in interstate commerce* and the sale of such energy *at wholesale in interstate commerce* is necessary in the public interest, such *Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*"

In the *Jersey Central* case, *supra*, this Court held that where a New Jersey electric company generated and sold electric energy to a second company in the State of New Jersey, and a portion of such energy found its way into the State of New York (through a connection maintained by the purchaser with a third company serving ultimate consumers in New York), an electric line owned and operated by the first company, by which the energy was delivered to the second company, was a facility for "the transmission of electric energy in interstate commerce," and that the first company was a "public utility" under the Act. In

holding that the Act did not contemplate the exercise of jurisdiction only where a company owns facilities which *cross* a state line, the Court again pointed to the purpose of the Act as follows:

> "The purpose of this act was primarily to *regulate the rates and charges of the interstate energy.* If *intervening companies* might purchase *from producers in the state of production,* free of federal control, *cost would be fixed prior to the incidence of federal regulation* and federal rate control would be substantially impaired, if not rendered futile." (*Jersey Central Power & Light Co. v. Federal Power Commission,* 319 U. S. 61, 71-2).

Bearing in mind the "primary purposes" of the Federal Power Act, i.e., to exercise control which had not previously been exercised by Congress over interstate sales of electric energy at *wholesale* (which control could not be exercised by the states) and at the same time to preserve to the states their existing powers to regulate intrastate utility companies and their local sales at retail, it is apparent that the Commission's assertion of jurisdiction in the present case is not in accord with such purposes.

The Company does not generate electric energy which is sold at wholesale in interstate commerce (*Hartford Electric Light Co. v. Federal Power Commission,* 131 F. 2d 953, certiorari denied, 319 U. S. 741); nor does the Company transmit electric energy which is resold at wholesale and ultimately consumed in another state (*Jersey Central Power & Light Co. v. Federal Power Commission,* 319 U. S. 61). Instead of generating or transmitting, in the State of Connecticut, electric energy which is ultimately consumed outside of the State, the Company here *receives* energy

within Connecticut *for local distribution and retail sale to consumers within the State.*

What purpose would be served by federal regulation in such a case? Before the Company receives the energy and distributes the same to its consumers within the State, the Federal Power Commission presumably has *already* exercised its function of regulating the company or companies which produced the energy in Massachusetts and transmitted the same to and across the State line into Connecticut, including the regulation of wholesale rates subject to the Commission's jurisdiction. This is not a situation where "cost would be fixed prior to the incidence of federal regulation", as was said in the *Jersey Central* case, *supra.* When the Company receives the energy at Bristol, the "incidence of federal regulation" has not only been reached but *passed.* In the interstate sale of the energy, the cost has already been fixed by the Commission. Thenceforth no interstate transactions take place and no federal rate control is involved. The company's costs are subject to the supervision of the State of Connecticut for the purpose of regulating the intrastate retail rates.

Under the present order of the Commission, the Company would be required to install the system of accounts prescribed by the Commission, and to follow the same with respect to all of its transactions in the State of Connecticut, and also to file inventories and original cost studies with respect to all of its property in the State of Connecticut. Under the determination that the Company is a "public utility", the Commission would possess many other regulatory powers over the Company, as noted elsewhere herein.

We submit that none of these far reaching results, which would flow from the occupation of the status of a "public utility" under the Act, were intended by Congress to apply to an intrastate distributing company simply because electric energy which it purchases for the supply of a small isolated portion of its electric system may sometimes originate in another state.

We submit further that, viewed against the background of its history* and very evident purposes, the Act cannot properly be construed to place the Company under the jurisdiction of the Commission in the present circumstances.

B. THE COMPANY DID NOT OWN OR OPERATE FACILITIES SUBJECT TO THE JURISDICTION OF THE COMMISSION AT THE TIME THE COMMISSION MADE ITS DETERMINATION.

The Commission's authority to prescribe and order compliance with a system of accounts, is contained in section 301 of Part III of the Federal Power Act (49 Stat. 854, 16 U. S. C. A. §825) which, by its terms, applies only to "every licensee and *public utility.*" Since the Company is not a "licensee" under Part I of the Act, the Commission's authority to make the order under review in this proceeding, can exist only if the Company is a "public utility" within the meaning of the Act.

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U. S. 61, 67, note 6.

*For a discussion of the legislative history and juridicial background of the Federal Power Act, see the majority and minority opinions in *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U. S. 61.

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A "public utility" is defined in Section 201 (e) of Part II of the Act (49 Stat. 847, 16 U. S. C. A. §824 (e)), as follows:

> "(e) The term 'public utility' when used in this Part *or in the Part next following* means any person who owns or operates facilities subject to the jurisdiction of the Commission *under this Part.*"

The facilities which are subject to the jurisdiction of the Commission (and those which are not) are specified in subsection (b) of section 201, which governs the application of Part II of the Act and provides as follows:

> "(b) The provisions of this Part shall apply *to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy* or deprive a state or state commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted acro s a State line. *The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction,* except as *specifically provided* in this Part and the Part next following, over facilities used for the generation of electric energy *or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce,* or over facilities for the transmission of electric energy consumed wholly by the transmitter."

The ultimate question in this case, therefore, is whether the facilities owned and operated by the Company at Bristol are subject to the jurisdiction of

the Commission under the foregoing provisions. We submit that they are not, for the following reasons.

1. *The Company does not own or operate facilities for the transmission or sale of electric energy at wholesale in interstate commerce.*

The Company does not sell electric energy "at wholesale in interstate commerce." In fact, it does not sell energy at wholesale at all in its Bristol district. The electric energy which is purchased from the Connecticut Power Company, and received at Bristol, is distributed to local consumers at retail.

Apart from the specific exemptions of certain facilities from the jurisdiction of the Commission (e.g. facilities used in local distribution) the question presented here, as in the Jersey Central case, is whether the Company owns or operates facilities "for the transmission of electric energy in interstate commerce," and that phrase must be construed with reference to the background and purposes of the Act.

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U. S. 61.

Under traditional concepts of "interstate commerce", this Court had held, prior to enactment of the Federal Power Act, that the receipt within a state, by a local distributing company, of natural gas originating in another state, and its sale and delivery to local consumers at retail, does not constitute "any part of interstate commerce".

Public Utilities Commission v. Landon, 249 U. S. 236, 245.
Missouri v. Kansas Gas Co., 265 U. S. 298.
See also:

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 471-2;
Illinois Gas Co. v. Public Service Co., 314 U. S. 498, 504.

In *Public Utilities Commission v. Landon*, (249 U. S. 236, 245) the Court held that although the piping of natural gas from state to state, and its delivery to independent local gas companies, is interstate commerce, the receipt of the gas and its retailing and delivery by the local companies to their consumers is wholly intrastate commerce and not a continuation of interstate commerce, even though the mains of the local companies were permanently connected to those of their vendors.

Did the Congress, in enacting the Federal Power Act, intend to do violence to such existing concepts of what is and what is not a "transmission in interstate commerce?" We submit that the background and legislative history of the Act indicate very clearly that it did not. The Act purports to regulate what Congress had not previously regulated—the sale of electric energy *at wholesale* in interstate commerce; that was its "primary purpose."

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U. S. 61, 67.

Under the declaration of policy contained in section 201 (a) of the Act, the business which Congress deemed affected with a public interest was that of "*transmitting and selling* electric energy for *ultimate* distribution to the public," i.e. a transmission or sale at wholesale, as distinguished from sales and deliveries of electric energy at retail to local consumers. This thought is further expressed later in the same subsection, in the statement that Federal regulation is necessary in the public interest with respect to "that part of such business which consists of the transmission of electric energy in interstate commerce *and the sale of such energy at wholesale in interstate commerce.*" The same juxtaposition of the phrases relating to "transmission" and "sale" continues in section 201 (b).

The significance of the phraseology used in section 201 (a) and (b) of the Act was specifically recognized by this Court in the *Jersey Central* case, *supra*, where the Court paraphrased the statute by relating the word "transmission" to the words "at wholesale." Referring to section 201 (b), the Court said:

> "Subsection (b) declares that the provisions of this part apply '*to the transmission of electric energy at wholesale* in interstate commerce.' This subsection gives jurisdiction over facilities used for *such transmission*. . . . The determinative fact is the ownership of facilities used in transmission. Such use makes the owner or operator of such facilities a public utility under the act (e)." (*Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U. S. 61, 72-73.)

In the *Jersey Central* case, *supra*, the Court was dealing with a situation where it could be said (in view

of the prior decisions of the Court that a sale at wholesale of electric energy which later crosses state lines is a transaction "in interstate commerce") that a transmission and sale at wholesale within the state, with *subsequent* resale at wholesale and transmission out of the state, was a "*transmission* in interstate commerce." Thus, the Court referred to the cases of *Public Utilities Commission v. Attleboro Steam & Electric Co.* (273 U. S. 83) and *Illinois Gas Co. v. Public Service Co.* (314 U. S. 498), both of which involved the sale of interstate electric energy or gas *at wholesale*, as follows:

> "Without this separation from the movement across the New Jersey-New York line, *the transmission by Jersey Central would fall within the definition of commerce declared by two former decisions of this Court.*
>
> "In *Public Utilities Commission v. Attleboro Steam Co.*, 273 U. S. 83, 86, this Court held *in interstate commerce* the sale of locally produced electric current at the state boundary with knowledge that the buyer would utilize the energy extrastate. The passage of custody and title at the line was held immaterial. *We see no distinction between a sale at or before reaching the state line.*" (*Jersey Central Co. v. Federal Power Commission*, 319 U. S. 61, 69).

Such reasoning can have no application to the present situation. The Company here is a local distributing company, engaged in a business which does not constitute "any part of interstate commerce," either in the sale of energy at retail for local consumption or in the delivery or distribution of such energy from the point of reception within the State to the local consumers. Under the Federal Power Act, the Company's rates to consumers are subject to exclusive regulation

by the State of Connecticut and it makes no sales of energy which would be subject to the jurisdiction of the Commission. No Federal purpose expressed in or intended by the Act would be served by placing such a local distributing company or any of its facilities under the jurisdiction of the Commission.

We submit that, in view of the background and purposes of the Act, it cannot be said that Congress intended to depart from the concepts of "interstate commerce" laid down in the prior decisions of this Court, so as to include in the phrase "facilities for the transmission of electric energy in interstate commerce," the facilities of a local distributing company used to receive and deliver energy at retail for local consumption within the state.

2. *The Company's facilities at Bristol are "facilities used in local distribution," over which the Commission has no jurisdiction.*

Moreover, whether or not the Company's facilities at Bristol, Connecticut, are to be considered as utilized for the "transmission of electric energy in interstate commerce," the Act specifically excludes them from the jurisdiction of the Commission.

So that there could be no possibility of mistaking its intention, Congress did not stop with defining the facilities over which the Commission has jurisdiction; it went a step further and defined the "facilities" over which the Commission "shall *not* have jurisdiction, except as *specifically* provided in this Part and the Part next following," i.e. Parts II and III of the Act. (Section 201 (b).) Among these exclusions from the jurisdiction of the Commission are "*facilities used in local distribution.*"

In view of the manifest purposes of the Act as previously outlined herein, and as referred to by this Court in the *Jersey Central* case, *supra*, there can be no question that the substation facilities owned and operated by the Company at Bristol are "facilities used in local distribution." They are not used to transmit—send across—electric energy for "*ultimate* distribution to the public" (section 201 (a)); they are not used for the "transmission of electric energy at wholesale" in interstate commerce (*Jersey Central* case, *supra*); they are used to distribute the energy received at the high tension line of the Connecticut Power Company in Bristol, Connecticut, directly to the local retail consumers in the Bristol district.

The Commission took the view that Congress intended to include within the scope of "facilities" used for "the transmission of electric energy in interstate commerce", all facilities:

> "from the generator, where generation is complete, to the point where the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission' is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution,' is begun." (Opinion of Commission, R75.)

The Commission, therefore, included within its description of "transmission facilities," the substation facilities used by this local distributing company to lower the voltage of the electric energy received at Bristol, and various devices used for handling the electric energy there, after the energy is received from the line of the Connecticut Power Company.

We submit that Congress intended no such narrow

and technical construction of the provisions of the Federal Power Act, so as to bring under the jurisdiction of the Commission a local distributing company because it owns and operates facilities whose function is not to "transmit" electric energy from point to point, but merely to receive the energy within the State and to lower the voltage and otherwise provide for the proper handling thereof, *at the point of reception,* for local distribution to retail consumers.

The Court below did not follow the Commission's reasoning. Instead it held that because the Commission is authorized to regulate the accounts of a "public utility" under Part III of the Act, and because such accounts may cover properties which constitute "facilities used in local distribution," there is specific provision in the Act for the regulation of such facilities by the Commission. The Court founded its decision upon the exception to the so-called "but" clause contained in section 201 (b), viz: "but shall not have jurisdiction, *except as specifically provided in this Part or the Part next following. . . .*" Thus the Court, referring to certain of Judge Frank's statements in *Hartford Electric Light Company v. Federal Power Commission* (131 F. 2d 953), said:

> "He reaches what seems to us the proper conclusion that section 201 (b) means to give the Commission jurisdiction over any facility for the transmission of electric energy in interstate commerce. The 'but' clause in the section is intended to make it clear that this jurisdiction extends even to local facilities *where the Act provides for their regulation, as it does in the case of accounting practices.*"

The fallacy of this reasoning is apparent. The Commission has no jurisdiction over the *accounts* of a

company *unless it is a "public utility."* Whether a company is a "public utility" depends upon whether the Commission has jurisdiction over "facilities" which it owns or operates. To say that the Commission has jurisdiction over facilities because it may regulate *accounts* for such facilities, which it may do only *if* the company *is* a "public utility," begs the question and tests the status of the company solely by reference to the results which would flow from that status if occupied by the company.

Moreover, the Court below seems to have completely overlooked the fact that under section 201 (e) of the Act, the test of whether a person is a "public utility" is whether it owns or operates "facilities subject to the jurisdiction of the Commission *under this Part*" i.e. under Part II of the Act. *The accounting provisions are contained in Part III of the Act* (§301). Obviously it was not intended that the status of "public utility" should be determined by reference to the accounting provisions contained in Part III, which are applicable only to one who is a "public utility" under the tests prescribed in Part II of the Act.

Indeed, the Court below does not seem to have considered the totality of the effect of its determination of the Company's status, with respect to the entire scope of the Commission's regulatory power over one who is a "public utility". The Court speaks as though all that were involved in the determination of status is the matter of accounting practices. Thus, referring to the construction urged by petitioner, the Court said:

> "Such a construction is a grammatical possibility. However, it contradicts the broad purpose of the Act to correct abuses of *write-ups, inflation of accounts and similar practices* which

> have on occasion been found in the utility industry. . . . It would encourage the setting up of unnecessarily complicated *accounting systems* between the owners of the segments of the artifically divided power system, which the Act is designed to eliminate."

This case does not involve an "artifically divided power system." The Company here is not affiliated in any way with the Connecticut Power Company, from which it purchases electric energy. It is a wholly independent distributing company, purchasing energy at arms-length from a stranger.

If the Federal Power Act leaves the door open to hypothetical corporate manipulations like those described in the opinion of the Court below, it does not follow that regulation may be evaded. The Federal Power Commission possesses jurisdiction over any company owning or operating facilities for the "transmission of electric energy at wholesale in interstate commerce." The state commissions have jurisdictions over companies operating local distribution systems, and that jurisdiction was intended to be preserved to them by the Federal Power Act.

If opportunity exists for corporate reorganizations which will divide an "interstate company" into segments i.e., two companies, one conducting the business of transmission and selling energy at wholesale, and the other conducting the business of local retail distribution, regulation may be *divided* but it *exists* and presumably will be exercised. If such a situation requires correction, there are means of correcting it other than misconstruing the plain provisions of the Federal Power Act.

3. *The Company's facilities at Bristol are used "only for the transmission of electric energy in intrastate commerce" within the meaning of the Act, and are excluded from the jurisdiction of the Commission.*

Apart from the question of whether the Company's facilities at Bristol are "used in local distribution," they also fall within the description of another class of facilities specifically excluded from the jurisdiction of the Commission, viz: those used "only for the *transmission* of electric energy *in intrastate commerce.*"

We have already shown that under the prior decision of this Court, the interstate journey of the electric energy ceases with its receipt by the Company at Bristol. Any "transmission" of the energy from the point of such receipt by a local distributing company is wholly "in intrastate commerce", and is not "in interstate commerce" within the ordinary meaning of such terms.

The phrase "transmission of electric energy in intrastate commerce" is not defined in the Act. However section 201 (c) provides as follows:

> "(c) For the purpose of this Part, electric energy *shall be held* to be transmitted in interstate commerce if *transmitted from* a state *and consumed at any point outside thereof;* but only insofar as such transmission takes place within the United States."

If this subsection were to be construed so as to stamp as facilities for "transmission in interstate commerce" *all* of the electrical facilities for the conveyance of electric energy from the point of generation in one state to the point of consumption in another state, then, of course, the Court below would be right, and all

facilities, including those "used in local distribution" —down to the electric bulb in a housewife's kitchen— would be subject to the jurisdiction of the Commission.

This, however, would completely nullify the "but" clause. Certainly, if no electric energy from another state flows through the facilities enumerated in the "but" clause, the exemptions contained therein would be wholly superfluous. That the Congress intended the exemptions to apply even though such energy flows through the facilities is plain. For example, there would be no point in exempting "facilities for the transmission of electric energy consumed wholly by the transmitter," unless the clause applies where the energy is produced in one state and consumed in another. Nevertheless, under the construction applied by the Court below, if electric energy from another state flows through any of the facilities enumerated, they would automatically become facilties for "transmitting electric energy in interstate commerce" and the owner or operator thereof would be a "public utility" under the Act.

We submit that Congress intended no such test of the Commission's jurisdiction, but that it clearly intended to exclude from jurisdiction the facilities which it specified as not being under the jurisdiction of the Commission, even though energy originating in another State may occasionally flow through them, including facilities "used only for the transmission of electric energy in intrastate commerce."

CONCLUSION.

Under a proper construction of the various provisions of the Federal Power Act discussed herein, the Company did not own or operate, at the times of the Commission's hearing and determination, any "facilities subject to the jurisdiction of the Commission" under Part II of the Act. The Company, therefore, was not a "public utility" under the Act at such times, and the Commission's order directing current compliance with its system of accounts and general accounting orders, was in excess of its jurisdiction and should have been set aside, in whole or in part, by the Court below.

In these circumstances the assertion and exercise of purported jurisdiction over the Company is not only illegal, but would unecessarily interfere with the power of the State to regulate local distributing companies.

The Company, under the decision below, would not only be required to comply with the accounting requirements of the Public Utilities Commission of the State of Connecticut, but also with those of the Federal Power Commission. In the case of conflicts of decision between the two regulatory bodies as to specific items in the accounts, the Company would be required to comply with both decisions.

If the Commission continues to assert general jurisdiction over the Company, as it undoubtedly will, many other possibilities of conflict will be present as to matters where dual regulation is involved. For example, the Company might seek and obtain the approval of the State Commission to the acquisition of securities of a company which is a "public utility" under the

Act. The Federal Power Commission would again assert jurisdiction, (Cf. *Jersey Central Power & Light Co. v. Federal Power Commission* 319 U. S. 61.) and it might deny its approval to the acquisition. The same possibility of conflicts would exist with respect to all other matters as to which the Federal Power Commission exercises regulatory power under the Federal Power Act. The nullification of the power of the State to regulate the business of the Company in such circumstances is apparent.

Such interference with the regulatory powers of the States may be a necessary concomitant where it is required in order to carry out the purposes of the Federal Power Act. Where no purpose of the Federal Power Act is to be served, such interference is unwarranted.

If it be true that one of the purposes of the Federal Power Act, as stated by the Court below, is "to correct abuses of write-ups, inflation of accounts and similar practices which have on occasion been found in the utility industry," such purpose obviously could exist only with respect to companies over which federal control is imposed. Certainly it was not the intention of Congress to correct such "abuses" with respect to local distributing companies whose supervision lies exclusively with the States under the provisions of the Act. If such "abuses" exist in such companies, the States possess plenary powers for their correction and it is no concern of the Federal Power Commission.

THE STATE OF CONNECTICUT JOINS THE COMPANY IN REQUESTING THAT THE WRIT BE GRANTED, TO THE END THAT THE COURT MAY HOLD THAT THE COMPANY AS A WHOLLY INTRASTATE DIS-

TRIBUTING COMPANY, ENGAGED IN THE BUSINESS OF SELLING AND DISTRIBUTING ELECTRIC ENERGY FOR LOCAL CONSUMPTION IN CONNECTICUT, IS NOT A "PUBLIC UTILITY" UNDER THE JURISDICTION OF THE FEDERAL POWER COMMISSION.

Respectfully submitted,

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